IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-592

BETWEEN	VALERIE JOAN EMSLIE AND GORDON WILLIAM EMSLIE Plaintiffs
AND	GENUINE INVESTMENTS LIMITED (IN LIQUIDATION) First Defendant
AND	JUDITH MAY CHEYNE AND MACKY TRUSTEE COMPANY LIMITED AS TRUSTEES OF THE R S TRUST Fourth Defendants
AND	REGISTRAR-GENERAL OF LAND First Third Party

Hearing: 22, 23 and 24 August 2005

Appearances: Mr J Burley for Plaintiffs
Mr R Parmenter for Fourth Defendants
Mr I Oliver for First Third Party

Judgment: 21 December 2005

JUDGMENT OF ASHER J

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Background facts

[1] Valerie and Gordon Emslie ("the Emslies") purchased a house at 2/36 Borich Road, McLarens Park, Henderson ("Borich Road") in September 1999 and have lived there since then. Mrs Emslie has ill health and does not work, receiving an invalid's benefit. Mr Emslie does some part time work. They have owned a number of homes over 30 years, but do not appear to have any commercial experience.

[2] In July 2001 their home was unencumbered. However, they owed rates arrears of $1,200 and were paying penalties, and owed further personal debts to the value of approximately $800. They were threatened by a Council rating sale. They needed about $2,000 to clear everything that they owed, and wished to do so.

[3] They noted an advertisement in the local newspaper. Genuine Investments Limited ("Genuine") was advertising the concept of homeowners making extra money although they are now vague as to the terms offered.

[4] Genuine was a company incorporated on 30 October 2000. The Companies Office Register showed that the Directors were Angela Mary Klassen and Philip Stanley Trevor Maxwell. Mrs Klassen owned 99 of the total of 100 shares. Mr Maxwell owned one share.

[5] The Emslies met Angela Klassen at some stage in July 2001. The name used by Mrs McCleary was Angela McCleary, and that is how the Emslies knew her. I will refer to her hereafter as Mrs McCleary.

[6] A meeting took place at the office of Genuine in New Lynn. Mrs McCleary advised Mr and Mrs Emslie to "consolidate their loan", and stated that there were various "ways" by which the Emslies could obtain further income by using the house as equity, and buying, improving and selling other properties. By these means the existing debt would be repaid, and they could avoid running into debt again.

[7] There were a number of meetings, but the Emslies are unable to specify how many and the precise matters discussed. Mrs McCleary explained that in order to obtain the necessary funding the Emslies would need to involve another person who

had a “good credit rating”. That person who was recommended was Philip Stanley Maxwell.

[8] The Emslies were introduced to Mr Maxwell by Mrs McCleary at her office. Apparently he contributed little to the discussions. Mrs McCleary appears to have decided what should happen. The title discloses that a mortgage was immediately registered against the title, but the Emslies have no recollection of how this came about, or what the mortgage was for.

[9] In due course the Emslies were advised by Mrs McCleary that they would need to transfer the title to their home into the name of Mr Maxwell and Mrs Emslie. The Emslies are vague on the details of this discussion, and the reasons given to them for the transfer. They say that they were somewhat naïve in their dealings with Mrs McCleary. They were told that the transfer was necessary for “credit rating” purposes.

[10] They were also told by Mrs McCleary to use a certain lawyer in relation to any future transactions concerning their home or the proposed investments. The Emslies had not had any previous dealings with him.

[11] The survival and production of relevant documents by the Emslies in this period appears to be haphazard. However, there is in existence a Deed of Trust between the Emslies as beneficiaries and Mr Maxwell as Trustee dated 18 February 2002. As with all the transactions with Genuine, Mrs Emslie appears to have no precise recollection of what she signed and why.

[12] This trust document records in its recitals that the Emslies, to facilitate their refinancing the properties, have agreed with Mr Maxwell that they will transfer to him and to Valerie Emslie a legal and equitable interest in the property. Mr Maxwell was to receive $5,000 for lending his name to the transaction and he was, contemporaneously with the execution of the Deed, to execute a transfer in respect of the properties “held by the beneficiary”. The beneficiary was the Emslies.

[13] There were a number of detailed provisions in the Trust Deed, including reference to the execution of a mortgage and a reference to a payment of loan proceeds by Mr Maxwell to the Emslies of the amount of the loan, which was stated to be $194,800.

[14] Clause 7 of the Deed of Trust provided that the Emslies as beneficiary were to have exclusive right to the occupation and use of "the properties" without any obligation to pay any money or consideration for this to Mr Maxwell, while he remained the registered proprietor of the properties with Mrs Emslie.

[15] Although the Deed of Trust referred to the Borich Road property being transferred to the name of Mr Maxwell and Mrs Emslie, there has been no document produced recording such a transfer. The Land Registration records disclose that such a transfer did occur on 26 March 2002.

[16] Mrs Emslie has no detailed recollection of the circumstances in which she and her husband signed the Deed of Trust and the transfer of title, or the reasons for the transactions. She is vague about all the detail of the dealings with Genuine and its Directors. Mr Emslie did not give evidence.

[17] The Emslies have produced an undated Agreement for Sale and Purchase from 2002 which shows Mrs Emslie and Mr Maxwell as vendors and R.D. & T. Reti as purchasers of a property at 1 Donovan Street, Massey ("Donovan Street"). There is also a mortgage from the Retis to Mr Maxwell and Mrs Emslie of $32,228.75. The Emslies are unable to provide any detailed explanation of this transaction, but they were aware of it. They understood that the money raised on Borich Road would be used on the Donovan Street property, and that in due course they would be repaid the money they had effectively advanced at least in part from the proceeds of Donovan Street.

[18] The Emslies knew that Donovan Street had been purchased in the name of Mrs Emslie and Mr Maxwell, and believe that there was a borrowing in relation to the property, and some improvements effected. They understood that they were to receive the profits from any sale. Apparently the mortgage for $32,228.75 is still

owing, and the Emslies are receiving all the interest payments. Mr Maxwell appears to have dropped out of the picture. However, they have not received any profits or seen any accounts relating to the purchase.

[19] During the period that had followed the initial contact between the Emslies and Genuine, the Emslies had received a number of benefits from the transactions organised by Mrs McCleary. Particularly they had received $2,000 to repay debt, and a further $5,600 paid to them for further expenses, a total of $7,600.

[20] Over a year after the initial contact, in about August 2002, Mrs McCleary told the Emslies that Genuine needed to take over ownership of Borich Road. She advised that after that one-year period the property would be refinanced so that the Emslies could buy it back. They were told that this arrangement was necessary because of their "credit rating".

[21] The Land Registry records show that on 10 September 2002 there was a transfer registered of the Borich Road property into the name of Genuine. This transfer has been produced and shows the signature of Mrs Emslie and Mr Maxwell.

[22] On 27 August 2002, shortly before registration of the transfer to Genuine, the Emslies signed an Agreement for Sale and Purchase with Genuine. The purpose of this document on its face was to record in a contract a buy-back arrangement for the Emslies. The terms of this buy-back arrangement included a provision that the settlement date was the first anniversary of the possession date. The possession date was stated too be 22 August 2003. The purchase price was $170,000.00, and the deposit stated to be:

> In consideration [sic] the amount owing from the previous Deed of Debt which will be repaid in full.

No previous Deed has been produced or is recalled by the Emslies.

[23] The Agreement also provided that the purchaser would be entitled to possession of the property, and that Genuine would be entitled to mortgage it. Payment of the purchase price was stated to be paid or satisfied by equal weekly

payments of $270, with the balance of the purchase price being paid in one sum on the settlement date, together with certain additional payments that are referred to.

[24] On 6 August 2002 the Emslies appear to have signed a Tenancy Agreement with a landlord described as "Mrs McCleary", providing for the payment of rent of $270.00 a week. Mrs Emslie stated that again this was signed at Mrs McCleary's request, and meant that as a consequence of what she described as "lies" to the Department of Social Welfare, that Department effectively paid part of that money.

[25] In the months that followed through to February 2004, the Emslies continued to occupy their home paying the $270 per week. They were aware of activities proceeding in relation to the home at Borich Road, although they were not aware of the detail, and do not appear to have understood the nature of the transactions.

[26] I have no doubt that all the transactions that have been described were instigated by Mrs McCleary, and entered into by the Emslies on the basis of their trust for her and Genuine, and their acceptance of Mrs McCleary's advice that such transactions were in their best interests. In particular I am satisfied that at all times they believed that Genuine would look after them and ensure that they got their house back, when the transactions that were deemed necessary had been completed.

[27] The Land Registry historical record shows that in this period there were three mortgages on the property, one to Liberty Financial Limited which was discharged; and two further mortgages, one to John Graham Turrall and Margaret Lilian McCann and one to Covenant Trustee Company Limited, neither of which had been discharged in July 2004.

[28] Then on 25 February 2004 the Emslies received a letter from the lawyer to whom they had been referred by Mrs McCleary, and who had acted for them. He forwarded a letter from solicitors acting for Genuine dated 24 February advising the Emslies that they had not settled the purchase of the property on 22 August 2003 when due, and that the letter was a settlement notice requiring settlement on or before 5pm on 11 March 2004 failing which the vendor might exercise its rights to

cancel, or exercise other remedies. This was followed by the forwarding in the same way of a notice of cancellation dated 12 March 2004.

[29] The Emslies had contacted their previous lawyer when they received the initial settlement letter. He advised them to settle or they could lose their right to their home. In late February 2004 they contacted Save Family Home Limited to help them with what was happening ("SFHL"). SFHL made unsuccessful efforts to speak to their lawyer, and wrote to him. No responses were received. On 5 April 2004 SFHL organised the lodging of a caveat in the name of Mrs Emslie. The caveat was registered on 6 April 2004. The interest that it protected was stated to be an estate or interest claimed:

> As purchaser of the land under an option to purchase undated with the registered proprietors Genuine Investments Limited.

[30] It seems that a dealing was lodged and the caveat subsequently lapsed pursuant to s 105 of the Land Transfer Act on 28 April 2004, as no application to extend the caveat was filed within the time limit prescribed by that section. Mrs Emslie stated that this failure to lodge the necessary application was due to her ill health. Mr Hetting of SFHL said that the cause was his inexperience in the caveat procedure.

[31] The Emslies had been paying rent at $270 per week since 23 August 2002. Having paid a total of $22,680 they stopped making these payments in the week of 30 March 2004, after receiving advice from Save Family Home Ltd.

[32] On 25 May 2004 the Emslies received a letter from Tenancy Services advising that an application had been made to the Tenancy Tribunal for rent arrears and termination of the tenancy. There was a hearing on 24 June 2004 following which orders were made against the Emslies. However, on 29 June 2004 a rehearing of the application was granted which was heard on Thursday, 15 July 2004. On 12 August 2004 the Emslies were successful in their arguments and the Tenancy Tribunal transferred the proceedings to the District Court Waitakere, where the proceeding lies still unresolved.

[33] In the meantime, without the knowledge of the Emslies, there had in May 2004 been dealings between Mrs McCleary for Genuine and the R S Trust, relating to the Borich Road property.

[34] The R S Trust was a Trust set up on 8 March 2002. A Judith May Cheyne was the settlor, and Judith May Cheyne and Macky Trustee Company Limited were the Trustees. Macky Trustee Company Limited is a professional Trustee company run by Peter Macky of Macky & Co., who acts for Ms Cheyne and her partner, Nathan Treloar.

[35] As a consequence of direct negotiations between Mr Treloar on behalf of the R S Trust and Mrs McCleary an Agreement was entered into between Genuine and the R S Trust for the purchase by the R S Trust of 2/23 Borich Road.

[36] Settlement was to be on 2 June 2004. The Agreement included a clause stating that the Agreement was conditional upon the purchaser's satisfactory inspection of the property, and a clause stating that the Agreement was conditional upon the purchaser being satisfied with a valuation report obtained from the vendor.

[37] This transaction was part of a number of Agreements between Genuine and the R S Trust. From the perspective of Mr Treloar and the R S Trust the primary object of the transaction was the acquisition of a separate and more expensive property in Mt Eden. Mrs McCleary had insisted that the purchase of Borich Road should be part of that transaction.

[38] A valuation was obtained in relation to Borich Road on 23 June 2004. There had been some delay in the settlement. The Agreement was declared unconditional on 24 June 2004.

[39] The valuation contained an old form copy of the Certificate of Title. The Certificate of Title showed the original ownership of the Emslies, and the transfer to Mr Maxwell and Mrs Emslie, prior to the transfer to Genuine.

[40] Macky & Co. had obtained a computerised search of the Certificate of Title shortly after receiving the Agreement for Sale and Purchase. It showed Genuine as the registered proprietor.

[41] After some delay, settlement was to take place on 21 July 2004. Mr Macky obtained a Guaranteed Search of the Title under s 172A of the Land Transfer Act *1952*. The Guaranteed Search copy obtained was dated 21 July 2004 and showed Genuine as the proprietor. It also showed the mortgages.

[42] The Agreement for Sale and Purchase between Genuine and R S Trust provided for a payment of $175,000 for the Borich Road property. On 21 July 2004 the Borich Road transaction was settled as part of the larger transaction. The mortgages on the property were repaid as part of the settlement. It seems likely that the bulk, if not all, of the purchase price was applied towards the repayment of those mortgages.

[43] On 26 July 2004 Mr Treloar of the R S Trust visited the Emslie home and spoke to Mrs Emslie. I will refer to this discussion in more detail below.

[44] On 27 July 2004, following the discussion with Mr Treloar, Mrs Emslie arranged for a second caveat to be lodged against the Title. This caveat was dated 26 July 2004 and registered on 27 July 2004. The interest or estate protected was stated to be:

> As beneficiary under a Trust evidenced by an Agreement for Sale and Purchase of the property dated on or about 22 August 2003 between the caveator and the registered proprietor, Genuine Investments Limited.

[45] On 30 July 2004 Macky & Co. lodged for registration discharges of the mortgages against the Title, a transfer, and a mortgage to a commercial lender with whom Mr Macky had an association, Livadia Properties Limited. On the same day the Trust wrote to the Emslies seeking rent.

[46] On 2 August 2004 Land Information New Zealand forwarded a Notice of Requisition in respect of the caveat dealing. It gave as the reason for the requisition the fact a that a caveat had been previously registered, and that no second caveat

might be lodged in terms of s 148 of the Land Transfer Act *1952*. Confirmation in writing was sought that the caveat lodged did not contravene s 148.

[47] On 10 August 2004 the lawyers for the R S Trust wrote to the Land Registrar advising that the second caveat was based on a prior Sale and Purchase Agreement under which the caveator had agreed to transfer the property to Genuine.

[48] On 10 August 2004 a further caveat document was lodged on behalf of Philip Stanley Maxwell and Valerie Joan Emslie (signed by Mr Burley of Callahan & Co., by now the solicitors for the Emslies on their behalf).

[49] It recorded an estate or interest:

> As beneficiaries under a Trust evidenced by an Agreement for Sale and Purchase of the property between the caveators as vendor and the registered proprietor, Genuine Investments Limited as purchaser as part of an ongoing buy-back arrangement between the parties including an Agreement for Sale and Purchase dated 27 August 2002 between the caveators as purchasers and Genuine Investments Limited as vendor.

[50] This caveat was accepted for registration by the Registrar-General of Land and is the caveat relevant to these proceedings. On 17 August 2004 confirmation was given by the Registrar-General that the caveat had been registered.

Procedural history

[51] Following the lodging of the documents for registration by the R S Trust and the successful registration of the caveat, a notice was given by the Registrar to the Emslies in terms of s 145 of the Land Transfer Act *1952*, requiring them to obtain an order that the caveat not lapse.

[52] Application was made by the Emslies and opposed by the R S Trust. There was a hearing of that application on 26 January 2005 and judgment of this Court was delivered on 28 January 2005: *Emslie v Genuine Investments Limited* (HC Auckland, CIV2004-404-4803, 28 January 2005, Associate Judge Lang).

[53] The judgment contained rulings on a number of matters to which I will refer below. It was directed that the Trustees of the R S Trust, who had applied to be added as parties to those proceedings, should be parties, despite opposition by the Plaintiffs. It was concluded that the caveat should not lapse, conditional upon proceedings being issued promptly and prosecuted with diligence.

[54] Proceedings were filed by the Emslies on 9 February 2005. The Defendants were Genuine Investments Limited (In Liquidation) as First Defendant, Angela McCleary as Second Defendant and Philip Maxwell as Third Defendant. Surprisingly, the R S Trust was not joined as a party, despite its obvious interest in the proceedings.

[55] The Trustees of the R S Trust were joined as Fourth Defendants at their request by Minute of 24 March 2005. At the request of the Fourth Defendants the Registrar-General of Land was joined as a Third Party. Surprisingly, the Plaintiffs have now discontinued against the Second and Third Defendants, a decision which appears to have been influenced by the perception that is held of their financial resources.

[56] The Official Assignee has recorded pursuant to s 248(1)(c)(i) of the *Companies Act 1993* that it agrees to the Plaintiffs commencing legal proceedings against Genuine Investments Limited (In Liquidation), and it has no opposition to the filing of the amended statement of claim. The Official Assignee has taken no steps in this matter.

[57] There was also an application filed by the Fourth Defendants to subpoena Mr Burley, counsel for the Emslies, as a witness. This resulted in Harrison J recording in a Minute of 5 August 2005 certain admissions by Mr Burley, where Mr Burley accepts that he did not have instructions from Mr Maxwell to sign the caveat of 10 August 2004, and that his firm did not act as solicitors for Mr Maxwell personally.

[58] I record that I was informed by Mr Burley for the Emslies that Mr McCleary had been asked to appear as a witness and had agreed to do so. Ultimately she did not come to Court, and did not give evidence.

The issues

[59] The issues arising from the sequence of events are as follows:

a) Do the Emslies have an interest in Borich Road?

b) Does the RS Trust have an interest in Borich Road?

c) What are the relative priorities between the Emslies and the RS Trust?

d) The status of the second caveat.

e) What remedies if any does the RS Trust have against the Registrar-General of Lands?

f) What relief, if any, do the Emslies have against Genuine?

[60] It is necessary to examine the various causes of action of the Plaintiffs to see whether they do have any interest in the land and/or claim against Genuine.

The Emslies' interest in Borich Road

[61] There has been no contest before me as to the facts related by Mrs Emslie of her dealings with Mrs McCleary and Genuine. Indeed, Mr Parmenter for the RS Trust has not sought to make any submissions on the question of the nature of the Emslies' interests, focusing his argument on the comparative priorities, and his client's entitlement to register its transfer. However, it is necessary that I determine the nature, if any, of the Emslies' interest, before I consider the comparative priorities.

[62] The first cause of action is that at all material times the Borich Road property was held under a constructive trust in favour of the plaintiffs as beneficiaries. It was pleaded that this was as part of an ongoing buy-back arrangement and had various essential elements. It is specifically pleaded at paras 70(b) - (d) that:

> (b) Prior to registration of the Second Transfer, Borich Road was held by Mrs Emslie and Mr Maxwell as trustees for the Plaintiffs in accordance with the Trust Deed in order to obtain finance using the Plaintiffs' equity in Borich Road that would then be used to acquire the Investment Properties which in turn would be sold and profits shared between the Plaintiffs and Genuine.
>
> (c) The Plaintiffs would re-purchase Borich Road under the Buy-back Agreement using the profits from the sale of the Investment Properties including Donovan Street.
>
> (d) The transfer of title to Borich Road from Mrs Emslie and Mr Maxwell to Genuine following registration of the Second Transfer was not to be a permanent arrangement.

[63] It was alleged that the cancellation of the buy-back following the issue of the settlement notice was a breach of trust, as was the sale to the R S Trust.

[64] A declaration is sought that Genuine holds Borich Road as constructive trustee for the Emslies, and that the Emslies' beneficial interest under the constructive trust constitutes a prior equitable interest in Borich Road to that of the R S Trust as subsequent purchasers.

[65] The arrangements between the Emslies and Genuine were created by a series of formal legal agreements, and informal discussions and understandings. This is not an uncommon situation. It was stated by Cardozo J in *Beatty v Guggenheim Exploration Co.* 225 NY 380 (1919) at 386, approved by Cooke P in *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 at 185:

> … A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

[66] It is clear that the constructive trust is not restricted to cases where the conveyance was fraudulently obtained. It was stated in *Bannister v Bannister* [1948] 2 All ER 133, 136:

> It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. … Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another.

[67] Constructive trusts have been applied to buy-back arrangements. In *Waller & Agnew v Davies* [2005] 2 NZLR 814. Harrison J found that the owners who were induced to part with title to their properties by the finance company's deception and fraudulent misrepresentations, were only giving management of their properties to the company. It was found that the owners were persuaded to sign Agreements for Sale and Purchase and memoranda of transfer on the misunderstanding that they remained as registered proprietors. The titles were held to be subject to a constructive trust in favour of the original owners.

[68] There can be no doubt that the representation was made by Mrs McCleary to the Emslies, and accepted by them, that both the transfers to Emslie/Maxwell, and the later transfer to Genuine, were necessary formalities to maximise the commercial position, but did not affect the ability of the Emslies to get the property back This created a constructive trust whereby Genuine held Borich Road for the Emslies on those terms. It was a remedial rather than institutional constructive trust, in that it was a specific arrangement made as a result of discussion between Mrs McCleary on behalf of, first, Mr Maxwell and then Genuine, and the Emslies. The arrangement was reflected at least in part by the Agreement for Sale and Purchase of 27 August 2002. However that agreement signed by the Emslies and entered into by them as the final step in a sequence dictated to them by Mrs McCleary, did not reflect the whole arrangement.

[69] The purported termination of the agreement of 27 August 2002 took place on 12 March 2004. This was a breach of that trust, and was indeed a breach of the terms of the Agreement for Sale and Purchase. There was no contractual right arising from the Agreement for Sale and Purchase to terminate at that point of time on the basis put forward, namely that the settlement of the buy-back by the Emslies

was required. Settlement was to be one year after the possession date of 27 August 2003, namely 27 August 2004. The agreement provided for settlement within two years from 27 August 2002. Genuine appears to have assumed that the period was one year only, and not realised that it was two years, and issued its settlement notice on 24 February 2004, before settlement was due.

[70] At that point of time the Emslies had stopped paying the monthly payments of $270 per week. However, this was not the ground put forward by Genuine for the termination. In any event, I doubt that non-payment would have justified a termination of the buy-back arrangement. It seems that the purpose of the rental arrangement was to benefit Genuine by extracting some money from both the Emslies and the Department of Social Welfare. That arrangement does not reflect particularly well on Mrs Emslie, who by her own admission was willing to be a party to a deception of Social Welfare. However, the scheme was put forward, Mrs Emslie says, by Mrs McCleary. Her agreement to it was perhaps symptomatic of the fact that Mrs Emslie was in Mrs McCleary's thrall, and was in a situation where she just accepted Mrs McCleary's directions as to what was best.

[71] It is also significant that no portion of $170,000 purchase price by owed by Genuine under the Agreement for Sale and Purchase had been paid to the Emslies. That issue seems to have been ignored by Mrs McCleary, and not pursued by Mrs Emslie. Until that happened Genuine's title was in any event subject to a constructive trust in the Emslies' favour.

[72] I find, therefore, that in June and July 2004 there was a constructive trust in relation to 23 Borich Road, whereby Genuine held the property in trust for the Emslies, to protect their right of reconveyance of the title and payment of the balance of the purchase price. While it is usual to consider these issues in terms of constructive trusts, I record that the interest could also be characterised as a resulting trust, as it was a transfer of property where the transferor retained a beneficial interest in the property: *Re Vardervell's Trust, White and others v Aardervell Trusts Limited* [1974] 1 All ER 47, 63-65.

[73] Mr Parmenter, for the R S Trust, has referred to the Agreement for Sale and Purchase of 27 August 2002 and points out that the promises and statements by Mrs McCleary that formed the basis of any trust, were not made by Genuine. It is suggested that Genuine as a third party cannot be a trustee. However, Mrs McCleary was undoubtedly acting as the agent for Genuine. Mrs McCleary owned 99% of the shares and was a Director with Mr Maxwell. The statements that she made must be regarded as statements made also on behalf of Genuine.

Interest of the R S Trust

[74] I have already set out the background facts relating to the interest of the R S Trust. Mr Burley, for the Emslies, has been critical of the actions of the R S Trust. He asserts that it did not diligently prior to settlement carry out all requisite searches, and that it turned a "blind eye" to the ownership dispute between Genuine and the Emslies.

[75] Mr Treloar gave evidence on behalf of the RS Trust. While he was at pains to emphasise that the settlor, his de-facto wife, Judith May Cheyne, was the Settlor and that he was not a beneficiary of the trust, he appeared to be in charge of the Trust's day to day affairs and was authorised by the trustees to give evidence.

[76] The purchase of the Borich Road property by the RS Trust arose because the R S Trust wished to purchase a house owned by Genuine in Burnley Terrace, Mt Eden. The transaction negotiated with Mrs McCleary was a trade deal, involving swapping various properties, and Mrs McCleary insisted that the R S Trust acquire the Borich Road property as part of the transaction. This was agreed to without enthusiasm by Mr Treloar, and on 13 May 2004 an Agreement for Sale and Purchase was entered into between Genuine and the R S Trust for Borich Road. The purchase price was $175,000 and the settlement date was 2 June 2004.

[77] Clause 15 of the Agreement for Sale and Purchase referred to the purchaser's right to inspect the property. Mr Treloar gave evidence that inspection was waived. The agreement was also conditional on the purchaser being satisfied with a valuation report. In due course the agreement was declared to be unconditional. The

Agreement for Sale and Purchase recorded the existence of a tenancy and rent of $270 a week.

[78] Mr Treloar was cross-examined vigorously by Mr Burley about the state of his knowledge and understanding of the Emslies' interests. I found Mr Treloar's responses to be frank and I accept his evidence as truthful. Unsurprisingly he agreed that his actions were entirely about money and that his object was to make a profit. He was aware of the tenancy agreement with the Emslies. Indeed there was reference to a tenancy in the Agreement for Sale and Purchase. He thought that the tenancy was genuine. He also saw a valuation which had an historic search of the title attached. It showed the Emslies as the former owner.

[79] Genuine's lawyer in the transaction, Mr Mathias, produced a letter from his file dated 6 July 2004 from his firm to the R S Trust's solicitors, Macky & Co., where it was stated:

> Further to settlement today, we are instructed to write to confirm previous advice and agreement reached between our clients, namely that our client was owner (and vendor to your client) of the above property on the basis that this resulted in the cancellation of a buy-back agreement with the previous owner. We understood your client was aware of this. The buy-back agreement was terminated, and our client became the registered proprietor. Furthermore, we confirm that a caveat was registered which was lapsed, and the confirmation of the lapsing of it and the previous owners have no interest was confirmed by a High Court hearing. Furthermore, we confirm on behalf of our client that the tenants occupying the property are currently in arrears, and collection of those arrears are the subject of a Tenancy Tribunal claim in favour of our client.

[80] This unsigned letter was found by Mr Mathias on a file not related to the Borich Road transaction. Mr Mathias' major file relating to the transaction was not able to be recovered from the Official Assignee's Office for the hearing. Mr Mathias did not consider that the letter was sent to Macky & Co., at least on the date shown on the draft. However, he was of the view that it probably was sent shortly before the actual settlement of 21 July 2005.

[81] It is not proven that this letter was sent to Macky & Co. It did not appear on the Macky & Co file which was brought to Court. It was not discovered. Mr Macky who appeared to me to be an entirely credible witness stated that he did not know

about any buy back. He was aware of the tenancy but could not recall whether any of his staff made specific enquiries about it. He regarded it as a relatively minor issue. There was another staff member involved as well who was not called, but there is no evidence that she knew of any buy back arrangement. Mr Macky was clear in his evidence that he did not know of the Emslies' claim or any Buy Back arrangement, and that his client did not discuss any such matter with him. He would have expected his client to discuss any concerns that he had about the purchase. Privilege was waived.

[82] I find that the R S Trust and Mr Treloar were not aware prior to settlement that there was an ongoing claim by the Emslies to ownership of the Borich Road property. Mr Treloar was aware that there was a tenancy dispute, but, of course, such a dispute would be thought to be entirely inconsistent with the Emslies having an ownership interest in the property. The fact that the Emslies had chosen to bring Tenancy Tribunal proceedings was indicative of the fact that the issues between them and Genuine were tenancy issues only. A reading of the actual Tenancy Tribunal papers might have indicated to the RS Trust a different type of dispute, but there was no evidence that Mr Treloar or anyone in Mr Macky's office saw those papers.

[83] Mr Treloar specifically denied being advised about there being a dispute as to ownership prior to settlement. He was cross-examined vigorously on this issue. He said that he believed that in discussions Mrs McCleary told him about the tenancy dispute, and that she did not discuss any problems with the buy-back arrangement. He was not particularly concerned about the tenancy dispute, and whether the tenant was paying rent, because he already had a buyer for the property and wished to sell it quickly. He intended to sort out the tenancy after purchase.

[84] Mr Treloar was entirely open about his indifference to the fight between the Emslies and Mrs McCleary about the tenancy. He accepted that he "deliberately turned a blind eye to making further inquiries as to what the fight was about". As he acknowledged, he was out to make "a quick buck". This was not turning a blind eye to an ownership claim by the Emslies. This would have been an entirely different matter, and I have no doubt would have prompted him to at least raise the matter

with his lawyers. However the tenancy dispute was not a concern to him. It was something that could be sorted out later.

[85] When he visited Mrs McCleary to discuss the tenancy on 26 July 2004 she then told him that she had a claim to the property. By then the transaction was settled, although the papers had not been registered. From his point of view the die was cast. The money was paid and the transaction could not be undone.

[86] To summarise my view of the position of the R S Trust and its knowledge of the Emslies' position, the R S Trust:

a) had information in its possession indicating that the Emslies once owned the property;

b) was aware that there was an ongoing tenancy dispute and that there were arrears of rental owed; and

c) was not aware and did not have reason to suspect that there was a current claim to the property by the Emslies as owners, or that they were claiming some beneficial interest prior to settlement.

[87] It was also submitted on behalf of the plaintiffs that the R S Trust had notice because subsequent to settlement it employed Genuine's previous agent involved in the tenancy dispute, Mr Knight of Chase Investigative Agencies. Because Mr Knight must have had knowledge of the Emslies' claim because of his involvement in dealing with the details of their tenancy dispute, it is said that his knowledge must also be imputed to the R S Trust. There is a simple answer to this submission. The relevant time for knowledge is the period up to the time of settlement. Mr Knight was not employed by the R S Trust up to the time of settlement. He was employed afterwards. The law on imputed knowledge and agency law is complex, and I do not propose traversing it. There is, however, a simple principle that knowledge cannot be imputed from an agent to a principal, unless that knowledge is acquired while the agency is in place at the relevant time.

As was stated by Hardie Boys J in *Jessett Properties Limited v UDC Finance Limited* [1992] 1 NZLR 138 at p 143:

> … It is apparent that knowledge acquired before the agency began, or probably even during its currency but outside the scope of the engagement, should not in general be imputed to the principal.

[88] This principle applies. Mr Knight's knowledge was not the knowledge of the R S Trust up to the time of settlement, and is irrelevant to the issues

[89] I emphasise that I do not consider that there were sufficient facts made available to the R S Trust to put it on enquiry as to the existence of an actual beneficial interest by the Emslies. The disclosed tenancy dispute indicated the opposite. I do not consider that there was anything reprehensible in the approach taken by the R S Trust. Mr Treloar wished the R S Trust to make a quick profit out of the transaction. He was buying Borich Road and selling it almost immediately. He was prepared to do this with the troublesome Emslie tenancy remaining in place at settlement, and would deal with problems that might arise in relation to it subsequently. This was a perfectly rational commercial attitude for him to take and I do not criticise him for it.

[90] The minimum essential requirements for the existence of an equitable interest in land arising from an enforceable contract affecting land are:

a) the existence of a contract entered into for valuable consideration; and

b) the availability of the equitable remedy as a specific performance (see Hinde, McMorland & Sim at 4.019).

[91] The R S Trust has an equitable interest in the property arising from the Agreement for Sale and Purchase. Having settled, it now has the right to take title, subject to the issue of the caveat and competing priorities. Its documents are with the Land Transfer Office, awaiting registration, delayed only by the existence of the caveat.

Competing priorities between the interest of the Emslies and the R S Trust

[92] The equities are, on their face, equal. The general rule is that the first in time prevails. The classic statement of the general principle applicable between persons having competing equitable interests is that in *Rice v Rice* (1853) 2 Drew 73, 78:

> … in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to; i.e. that a court of equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of the relative merits that there is no other sufficient ground of preference between them, or in other words that their equities are in all other respects equal; and that, if the one has on other grounds a better equity than the other, priority of time is immaterial.

[93] If the R S Trust's equity is later in time, the onus lies on the Trust to establish the better equity as against the Emslies who have the earlier interest: *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd* [1995] 1 NZLR 129, 137 (CA).

[94] Delay itself is not enough to reverse the order of priority, in that all the relevant circumstances must be taken into account. Failure to caveat is only one of the factors to be considered in determining whether it is inequitable that the prior claimant retains temporal priority (*Harris v Anais Holdings Ltd* [2002] 3 NZLR 511, 515). In *Butler v Fairclough* (1917) 23 CLR 78, 91-92 the failure of an equitable mortgagee to lodge a caveat for one clear day brought about the loss of priority over the holder of a complete new equitable interest who had been misled by the result of a search.

[95] In determining which party has the better equity, there is a wide range of relevant considerations, which are not confined to the nature of the interest in the land. The conduct of both parties is relevant. Gibb CJ in *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 333 described the proper approach to assessing the better equity (cited with approval in *Green v Meltzer* (1993) 6 NZCLC 68, 393 (CA) by Casey J at p 68,396 and Thomas J at p 68,409 and in *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd* at 136):

> … preference should be given to what is the better equity in an examination of the relevant circumstances. It will always be necessary to characterise the

> conduct of the holder of the earlier interest in order to determine whether, in all the circumstances, that conduct is such that, in fairness and in justice, the earlier interest should be postponed to the later interest. … To say that the question involves general considerations of fairness and justice acknowledges that, in whatever form the relevant test be stated, the overriding question is "… whose is the better equity, bearing in mind the conduct of both parties, the question of any negligence on the part of the prior claimant, the effect of any representation as possibly raising an estoppel and whether it can be said that the conduct of the first or prior owner has enabled such a representation to be made…": Sykes, *Law of Securities*, 3rd ed (1978), p 366; see also *Dixon v Muckleston* (1872) LR 8 Ch App at p 160; *Latec Investments* (1965) 113 CLR at p 276.

[96] Thus, the task involves considering whether the equity holder second in time, in this case the R S Trust, had established that there had been conduct sufficient to discharge the first equity holder's prima facie priority. It is clear that the conduct of both the holder of the earlier interest and the holder of the later interest is taken into account. As was stated in *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd*, p 137, the Court is after all concerned with the demands of fairness and justice.

[97] Here the factors relevant to the order of temporal priority are as follows:

a) The Emslies transfer of the property first to Mr Maxwell and Mrs Emslie, and then to Genuine.

b) The Emslies failing to lodge a caveat to protect their interest, and then placed a caveat on the title but allowed the caveat to lapse.

c) The state of the knowledge of the R S Trust and its conduct up to settlement.

I will consider these in order.

The transfer by the Emslies to Genuine of 2/36 Borich Road

[98] A prior equity holder can lose priority by allowing evidence of title, such as a transfer, to remain in the possession of a further party, thus enabling that third party to show an unencumbered title to a third party. This proposition has been developed

in the area of mortgages in England, where a prior equity holder allows the title deeds to land to remain in the possession of a borrower, thus enabling the borrower to lead a second holder to believe that a new charge will be a first priority: *Waldron v Sloper* (1852) 1 Drew 193, *Farrand v Yorkshire Banking Co.* (1888) 40 ChD 182, referred to in *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd*, p 138. As Lord Selbourne LC put it in *Dixon v Muckleston* (1870) LR 8 Ch App 150 at 160, the holder of the prior equitable interest has:

> … armed another person with the power of going into the world under false colours.

[99] It is relevant that the Emslies allowed Mr Maxwell to go on the title, and then signed an Agreement for Sale and Purchase and a transfer of the property to Genuine. I have no doubt that they were beguiled into doing so by Mrs McCleary and her vague assurances that this was necessary so that further money could be borrowed and the Emslies' fortunes ultimately advanced. However, they did make the decision to submit the property effectively to her legal care in the hope that she would use it to make them money.

[100] I doubt whether they would have understood the ramifications of this, in particular the possibility that Genuine could then breach the trust arrangement that existed, and transfer the property to a third party. Again, this derives from their naivety. However, in the situation of competing equities, it must be said that the Emslies acted most imprudently in signing over their property to Genuine, and giving it the power to then on sell. Indeed, Mrs Emslie was at least aware that Genuine would be approaching third parties in relation to the Borich Road property. She knew that Mrs McCleary would be approaching mortgage lenders for money in relation to the property.

[101] There can be no doubt that if this had not happened, the property would never have been available to Mrs McCleary to sell through Genuine to the R S Trust. The fact is that as a consequence of the Torrens land registration system having been in place in New Zealand for so long, persons involved in the sale and purchase of land have an expectation that the holders of equitable interests will take steps to protect their interest by recording it on the title. When a title is unencumbered, it does not

occur to innocent purchasers to check further. It falls into the exception to temporal priority referred to in Meagher Gummow and Lehane, *Equity: Doctrines and Remedies* (4th edn), para 8.035:

> The *first* exception is found where the holder of the prior equity vests property in another in order to enable that other to deal with it on his behalf. In this case the holder of the prior equity and the legal owner of the property are not only *cestui que trust* and trustee but also principal and agent, and the latter relationship dominates for the purpose of determining priorities. Thus, if the prior equity-holder vests his property in an agent and hands him the *indicia* of title to that property in order to enable the agent to deal with the property on his behalf, any person acquiring a later equitable interest without notice of the terms of the agency will be preferred to the principal's prior equity, although his equity was created in breach of the terms of the agency: *Rimmer v Webster* [1902] 2 Ch 163 at 172-3. (emphasis original)

[102] The position left then is that the Emslies, by a perhaps understandable but commercially reckless act, have contributed to the situation where there are now two competing priorities. I must put entirely to one side the fact that the R S Trust may, if they were to be held to not have priority, have some claim against the Registrar-General of Land based on a guaranteed title. That is not relevant to an assessment of competing equities, tempting as it may be to use it as a basis for favouring the Emslies.

[103] In the circumstances, I am bound to conclude that the Emslies' action in transferring the property into the name of Genuine, and to a lesser extent in not pursuing the registration of a caveat or taking other steps to draw their claim to the attention of the public, make it just and fair that priority should be reversed.

[104] This decision will undoubtedly seem harsh to the Emslies. The transfer to the R S Trust was made by Genuine in breach of trust. The Emslies have been duped. However, this is not a case such as *Waller & Agnew v Davies* where the first claimants did not understand that the effect of the documents that they were signing was to transfer title away from themselves to a third party. Here the Emslies did understand that they were giving up control of their property to Mrs McCleary. It was a risk they took, and they took the risk because they wished to make a profit. They are not to be criticised for wishing to make money out of their property and improve their financial circumstances, but the consequence of that decision is that they lost control of the property, and are now seeking to assert it against the claim of

this innocent purchaser. In equity that innocent purchaser, the RS Trust is entitled to have priority reversed, so the current conflict of priorities is resolved by attributing the responsibility to the party that caused the situation.

Failure to register the caveat

[105] It is clear that failure to register a caveat promptly can, but not necessarily will, be conduct that may justify a reversal of priorities of equitable interests in land: *Australian Guarantee Corporation (NZ) Ltd v CFC Commercial Finance Ltd*, p 138, *Butler v Fairclough* at 92. It is clear that failing to lodge a caveat does not necessarily involve the loss of priority: *J& H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546, 554. A distinction will be drawn between negligence and mere carelessness: *Shropshire Union Railways & Canal Co. v The Queen* (1875) LR 7 HL 496, Meagher Gummow and Lehane, paras 8.049 – 8.050.

[106] In this case it is clear that the Emslies were not exercising any commercial judgment of their own in making decisions about caveats; they did not have the commercial experience or understanding of legal and conveyancing issues, to do anything except take advice. They did not lodge a caveat initially, because they did not know that they were able to.

[107] Mr Hetting of Home Save Ltd gave evidence. He was the person who advised the Emslies when they came to see him. He confirmed that the Emslies lodged the first caveat on his advice. He stated very frankly that he did not know all the laws regarding caveats and was not aware that the caveat would lapse so soon, at the time. Mrs Emslie gave evidence that at the time the caveat lapsed she was ill. There is a suggestion in the draft letter produced by Mr Mathias of 6 July 2004 that there may have been a Court hearing in relation to the first caveat, and that is a matter that was not resolved by the evidence that I heard.

[108] I am satisfied that no personal blame can be put on the Emslies for the caveat lapsing. The fact is, however, that it did lapse and that there was nothing on the title to warn the R S Trust of the existence of the Emslies' interest. They must to an

extent take the responsibility for this, even if it may have been in part due to an error of their advisors.

[109] On its own the non-registration of the caveat may not have been sufficient to warrant a reversal of priority. However, it is to some extent a factor of relevance in the decision, and is supportive of reversal.

The state of knowledge and conduct of the RS Trust

[110] I do not take into account any action by the R S Trust as relevant to the balancing exercise, in the sense that I do not regard them as having undertaken any disentitling conduct. There was nothing in its conduct which is relevant to an assessment of the equities. The R S Trust cannot be blamed for settling and not making further inquiries about whether the Emslies had an interest. There was nothing to put them on their guard that the Emslies might have a claim in addition to their Tenancy Tribunal claim. It is true that they might have considered the fact that the Emslies were once on the title and just out of an abundance of caution, made some inquiries of the Emslies as to whether they were really just tenants, or, rather, had some equitable interest. However, such a course of action, which Mr Burley for the Emslies urged upon me, is not a reasonable imposition. There is no duty of care on the part of those dealing with Torrens system land, to check with previous owners on a "just in case" basis. Without anything to specifically alert them to a claim, the conduct of the R S Trust cannot be criticised.

Conclusion as to priority

[111] The temporal order of priority has to be reversed. I am satisfied that the RS Trust has the better equity. The Emslies transferred the title to their property to Genuine. They were prepared to let Genuine deal with it for the purpose of raising finance for money making ventures. This action, and the failure to lodge a caveat, led to the current situation. It would not have happened otherwise. It would be inequitable to treat the RS Trust interest as subsequent to that of the Emslies. The fact that the Emslies are naive people who have been duped by a third party, Mrs

McCleary, and the fact that the RS Trust was involved in a commercial transaction for profit, cannot bear on this decision.

The second caveat

[112] The R S Trust submits that the second caveat is of no force and seeks an order revoking the interim order sustaining it. I have set out the sequence of events which led to the lodging of the second caveat. A number of issues arose in relation to the second caveat. The R S Trust submits that it was a true second caveat and for that reason should be revoked. The Emslies deny that it was a second caveat, saying that it protected a different interest from the first caveat. They also submit that, in any event, issue estoppel applies, and the judgment of 28 January 2005 ordering that the caveat do not lapse has finally determined the issue which cannot be reconsidered.

Did the second caveat relate to the same interest as the first caveat?

[113] The first caveat registered on 6 April 2004 was stated to protect the following estate or interest:

> As purchaser of the land under an option to purchase undated with the registered proprietors Genuine Investments Limited.

[114] The second caveat registered on 27 July 2004 in its initial wording read:

> Beneficiary under a trust evidenced by an agreement for sale and purchase of the property dated on or about 22 August 2003 between the caveator and the registered proprietor, Genuine Investments Limited.

[115] The amended second caveat lodged on 10 August 2004 read as follows:

> As beneficiaries under a Trust evidenced by an Agreement for Sale and Purchase of the property between the caveators as vendor and the registered proprietor, Genuine Investments Limited as purchaser as part of an ongoing buy-back arrangement between the parties including an Agreement for Sale and Purchase dated 27 August 2002 between the caveators as purchasers and Genuine Investments Limited as vendor.

[116] The question arises as to how these caveats are to be interpreted. Is it necessary to consider the factual background as it is with a contract document, or are the words to be interpreted solely on their face?

[117] There has been some consideration of this issue in relation to public documents generally. In *Slough Estates Ltd v Slough Borough Council* [1971] AC 958, 962, 963, 967 – 968, it was held that public documents should be construed on their face, as those reading them will not have a knowledge of the background circumstances, see also *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 3 NZLR 740, paras 19-21.

[118] The rule that no second caveat may be entered is stated in s 148 of the Land Transfer Act 1952. It reads as follows:

> **148 No second caveat may be entered**
>
> (1) If a caveat has been removed under section 143 or has lapsed, no second caveat may be lodged by or on behalf of the same person in respect of the same interest except by order of the High Court.
>
> (2) For the purposes of verifying that a caveat does not contravene the prohibition in subsection (1), the Registrar is not obliged to inquire further than the current folium of the register or computer register for the land.

[119] Sub-section (2) would indicate that the caveat is to be examined entirely on its face by the Registrar. However, s 148(1) refers to a matter of real substance. It ultimately requires the High Court to consider whether the caveat is protecting "the same interest".

[120] To do this it is legitimate for the Court to go further than the plain words of a caveat, and to consider the substance of the interest that a party is seeking to protect. It seems highly unlikely that it was intended by the drafters of s 148 that a party might be able to lodge a second caveat, simply by expressing the protection of the underlying interest in a different way using apparently different words. The purpose of the section was presumably to ensure that the strict rules set out for the challenging of caveats, and their subsequent lapsing if certain steps were not taken, were not nullified by parties being able to allow caveats to lapse and then

immediately lodging a further caveat. This would undermine the policy of the Act: *AG v Langdon* [1999] 3 NZLR 457, 473.

[121] The first caveat here referred to an "option to purchase." It appeared to be relating back to the buy-back agreement of 27 August 2002. There is no other "option to purchase" that it is referable to. The second caveat of 27 July 2004 is clearly referring to the same interest. There was no other relevant Agreement for Sale and Purchase, save for the first agreement, and that could not have been the relevant agreement because it was not with Genuine. The Agreement for Sale and Purchase appears to have an incorrect date, as there was no suggestion that there was ever any agreement of 22 August 2003. The reference must be back to the buy-back agreement with Genuine of 27 August 2002. Certainly if it was suggested that the reference was to an agreement of 22 August 2003 the caveat would have failed, because it would have referred to a fictional agreement.

[122] In its ultimate wording on 10 August 2004, the caveat is clearer still. The date of the agreement referred to in the caveat is rectified to 27 August 2002. It is asserted that the interest is as "beneficiaries under a trust" evidenced by that Agreement for Sale and Purchase. The word used is "including" an Agreement for Sale and Purchase dated 27 August 2002. Thus, the interest expressed goes beyond the buy-back agreement itself. No other agreement or arrangement is specified, and the first words recording the evidencing of the trust refer only to that same 27 August 2002 Agreement for Sale and Purchase. As the analysis of the facts of this case have demonstrated, the Emslies do not have a number of different constructive trust claims against Genuine. They have a single constructive trust claim, which is based on the agreement of 27 August 2002 and what Mrs McCleary said on behalf of Genuine in the period leading up to the signing of that agreement.

[123] It was established in *Cotton v Keogh* [1996] 3 NZLR 1 (CA) that a caveator cannot avoid the consequences of s 148 by modifying the form of the caveat. In that case there was a hedge on the boundary of two properties. The first caveat termed that there was a "pre-existing boundary". The theoretical basis for the second caveat was different. It was expressed to be "by virtue of a constructive trust". The High

Court concluded that for the purposes of s 148 this was "in the same right and for the same cause". The Court of Appeal agreed. Blanchard J stated (at 9):

> The prohibition in s 148 cannot be avoided by framing the second claim in a different manner when it in fact relates to the same alleged right and is lodged for the same purpose.

[124] The question in this case is whether the caveat was lodged, in the words of the High Court Judge in *Cotton v Keogh*, in the same right and for the same cause. There are, of course, some technical differences between the two caveats. The most obvious is that Mr Maxwell and Mrs Emslie both ultimately lodged the second caveat, whereas the first caveat was lodged only by Mrs Emslie. However, this was not really a material change, in that Mr Maxwell never gave any authority or instructions in relation to the caveat, and there was no dispute about the fact that Mrs Emslie and her solicitors had simply chosen to add Mr Maxwell's name on to the second caveat. The solicitor signed the caveat purportedly on Mr Maxwell's behalf. However, the caveat was effectively lodged by the same person, Mrs Emslie. It still protected the same interest.

[125] While the first caveat purports to rely on an Agreement for Sale and Purchase, and the second a trust, the trust derives from the same Agreement for Sale and Purchase and it is an equitable interest. The reference to the trust in the second caveat goes to the heart of the interest, whereas the first caveat refers only to the document which evidences the trust. However, the interests are one and the same, expressed in a different way.

[126] While the wording of both the first and the second caveats can be criticised, there can be no doubt that the intention of both was to protect the same interest. The caveat of 10 August 2004 is a second caveat and therefore it should not have been accepted by the Registrar-General.

The judgment of 28 January 2005

[127] The Registrar-General had been concerned that the second caveat was lodged in breach of s 148, but was ultimately persuaded to allow it to be registered. It was stated in the High Court judgment of 28 January 2005 at para [65]:

> [65] In my view the original caveat sought to protect a contractual right to purchase the property. Although no formal option to purchase has been produced in evidence, it is possible that the first caveat was referring to the agreement for sale and purchase dated 27 August 2002. In any event I am satisfied that the interest referred to in the first caveat, based as it was in contract, is different to the claim now advanced on equitable principles. For this reason I am satisfied that the second caveat in its final form does not seek to protect the same interest as that protected by the caveat that lapsed in May 2004.

[128] The High Court judgment of 28 January 2005 was not expressed to be a final judgment in any respect. Caveat judgments are by their nature interim. They generally are a precursor to a trial as to the merits of the interest protected by the caveat. It must always be borne in mind that the lodging of a caveat does not itself create an equitable interest or indeed of itself improve the priority of an equitable interest. It merely provides notice of an interest, without enhancing the interest itself. The role of a judge in assessing an application that a caveat not lapse or an application to remove a caveat, is to decide whether it should be allowed to remain against the title.

[129] I have no doubt that the judgment of 28 January 2005 was in its entirety intended only to be an interim judgment, made under the usual pressure that applies when these sorts of procedural judgments are made, and without the benefit of full argument. The order sought was only that the caveat not lapse. Such an order is never intended to be a permanent order. By definition it is an order that holds until the interests that the caveat is protecting are tested at a full hearing of evidence. The judgment in its nature is interlocutory.

[130] Issue estoppel in caveat cases was considered in *Joseph Lynch Land Co. Ltd v Lynch* [1995] 1 NZLR 37 (CA). The Court accepted that a sufficiently final and certain conclusion could be found in what is effectively an interlocutory judgment, so as to found a subsequent issue estoppel (p 42). However, it was pointed out that

applications to remove or to hold a caveat will not ordinarily be regarded as finally determining the rights of the parties. It was stated at pgs 42-43:

> The purpose behind cause of action estoppel and issue estoppel is that litigants should not be twice vexed by the same claim or point and it is in the public interest that there be an end to litigation: See *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) at p 95 per Somers J, *Gregoriadis v Commissioner of Inland Revenue* [1986] 1 NZLR 110 (CA) at p 114, per Richardson J and p 118 per Somers J. … While we acknowledge that points decided in interlocutory proceedings may in certain circumstances lead to an estoppel, the rationale is less powerful in an interlocutory context. Therefore the justice of the case must be compelling before a decision which is in substance interlocutory is held to prevent the later ventilation of an issue.

[131] Issue estoppel is in the end a doctrine based on fairness. It is unfair for a person to have to reargue an issue that has already been properly and finally determined. It is commented in 16 Halsburys Laws of England (4th ed, reissue) (Estoppel) at para 977, referred to in *Joseph Lynch Land Co. Ltd v Lynch*, p 43, that the scope of the doctrine of issue estoppel depends on whether the Court takes a narrow or a wide view of the extent of the issue determined in the earlier case. If the earlier decision is in substance interlocutory, it will usually be reasonable to adopt a narrow view.

[132] Caveat cases are decided on affidavit evidence. It is always possible that not all relevant material is before the Court. A distinction can theoretically be made between those aspects of the judgment which deal with whether there is a caveatable interest (which must be subject to further consideration) and those which deal with procedural issues such as whether there is a second caveat. However, I do not believe that such a distinction has validity in this situation. It would be absurd if a caveat judgment had to be appealed on some issues, but on other issues it could be reviewed by the High Court in a substantive hearing. A caveat judgment must, in the circumstances, be altogether of an interlocutory and non-binding nature in relation to the final High Court case, or be altogether binding and determinative.

[133] In my view, this judgment clearly falls into the former category. The "narrow view" referred to in Halsbury's is to be adopted. It is to be observed in relation to this particular issue of there being a second caveat, that it was dealt with by a paragraph in the judgment of 28 January 2005, and there does not appear to

have been extensive argument on the point. It was one of many issues. This is what is to be expected in caveat cases, and is a further reason why issue estoppel should not apply. Indeed it would be unfair if this judgment was regarded as final, given the truncated time frame, the absence of oral evidence and cross examination, and the lack of opportunity for discovery, that are features of caveat cases.

[134] I note that until the Court has heard all the evidence, it may not be possible for it to determine whether a caveat is in fact a second caveat. Given the fact that such a consideration turns on the nature of the interest protected, the answer may only become fully apparent after discovery and the hearing of evidence. Indeed, Mr Parmenter for the fourth defendant commented that that was exactly the situation here, and that not all the arguments that could have been made in respect of the second caveat were made, because of a lack of a full understanding of the situation.

[135] There are a number of indications in the judgment that it is an interim judgment only. Throughout the judgment the phrases "arguable" and "arguably" are used, and at para 66 it is recorded "For present purposes, however, I am not satisfied that this submission provides a ground for not sustaining the caveat …". At para 71 there is reference to the fact that in the future the issues between the parties will be ultimately determined. It is also to be noted that in the judgment of 28 January 2005 the order that the caveat should not lapse was conditional upon Mr and Mrs Emslie issuing proceedings and prosecuting them with due diligence. These phrases and words all indicate what is, in any event, implicit, namely that the decision is an interim decision made pending a final consideration by the High Court.

[136] I conclude that issue estoppel does not apply and this Court is able to consider the question of whether there was a second caveat afresh, treating, of course, the earlier decision with appropriate respect. In all the circumstances, I am satisfied that the second caveat was lodged in breach of s 148, and the Registrar erred in accepting it for registration.

[137] Leave to file a second caveat could have been sought pursuant to s 148(1) of the Land Transfer Act, and indeed could still be sought. However, it will not assist

the Emslies. In exercising its discretion under s 148 the Court will generally have regard to:

a) the strength of the case made by the applicant to support the claimed interest in the land;

b) any explanation for failure to exercise the caveator's rights under s 145; and

c) whether unavoidable prejudice would be suffered by those who have acted in reliance on the register and in the belief that the caveator was not pursuing the claim.

Here, undoubtedly, inevitable prejudice will be suffered by those who have acted in reliance on the register, namely the R S Trust: *Muellner v Montagnat* (1986) 2 NZCPR 520 at pp 523-524, *Lowther v Kim* [2003] 1 NZLR 327.

[138] It is necessary then to consider the effect of lodging an invalid caveat. A breach by the Registrar of s 148 of the Act by receiving a second caveat without an order of the High Court is an omission or mistake of misfeasance by the Registrar for which compensation is payable under s 172 of the Land Transfer Act 1952: *AG v Langdon*.

[139] In *AG v Langdon* it was held that it was unlawful for the Registrar to receive a second caveat. If a second caveat has been received unlawfully by the Registrar, this Court must have jurisdiction at a substantive hearing where the merits are traversed, to revoke the earlier order that a caveat not lapse. The fourth defendant has sought an order that the caveat be removed, but there are jurisdictional issues that arise because the RS Trust has no registered interest: s 143(1), *Boswell v Francis* [1974] 2 NZLR 488, 490, *Re Stewart and Co, ex parte Piripi Te Maari (No 2)* (1892) 11 NZLR 7 45. It is preferable to revoke the earlier order which is to be regarded as an interim order for the reasons given earlier in this judgment.

Other arguments raised in relation to the form of the caveat

[140] Mr Parmenter sought an order that the interim order sustaining the second caveat be revoked on other grounds as well.

[141] He argued that the second caveat should not have been ultimately registered because it differed in form from that which was originally presented for registration. The second caveat originally presented for registration on 27 July 2004 was subject to a requisition by the Registrar-General, who was concerned that it might indeed be a second caveat. A further version was filed. The changes between the first version and the second were as follows:

a) The correction of the obvious error as to the date of the agreement already referred to in this judgment.

b) The addition of Mr Maxwell as a caveator, to reflect the fact that he had originally held the property on trust with Mrs Emslie.

c) The wording in its final form expands the estate or interest claimed.

[142] Mr Parmenter had submitted in the earlier hearing, and has reiterated the submission in this Court, that the changes were so extensive that they amounted to an entirely new caveat, and that it should not have been accepted by the Registrar-General. The conflict between this submission that this is a new caveat, and the submission earlier referred to that the caveat was effectively a second caveat reflecting the interest sought to be protected in the first, is obvious and was understood by Mr Parmenter.

[143] As I have found, the interest sought to be protected in both caveats was essentially the same. The addition of Mr Maxwell did not alter the substance of the caveat, and I am prepared to accept that it is open to the Registrar to accept a reformatted caveat relating to the same interest, which contains corrections of errors in the words of the original caveat. The Registrar can accept non complying instruments if the non compliance does not affect the operation or effect of the instrument: s 237 Land Transfer Act 1952.

[144] I consider that the conclusion reached in the judgment of 28 January 2005 was correct, and that the caveat ultimately registered on 17 August 2004 should not be removed, simply because it was an amended form of the caveat lodged on 22 July 2004.

[145] It was also argued in the January hearing, and reiterated before this Court, that the caveat should have been rejected because it was signed on behalf of Mr Maxwell by Mr Burley, when he had no authority to do so. However, I do not accept that this was a valid ground for the Registrar-General rejecting the caveat, or for this Court to order its removal. While the caveat should not have been signed on behalf of Mr Maxwell, it was signed by Mrs Emslie. She undoubtedly had an equitable interest in the land. The caveat did protect that interest in the land, and should not have been rejected for the reason alone that Mr Maxwell had been wrongly joined as signatory.

The fourth defendant's claim against the Registrar-General of Land

[146] Section 172A of the Land Transfer Act 1952 was enacted following the decision of *Bradley v Attorney-General* [1978] 1 NZLR 36. In that case it was held that a solicitor who relies on the Register alone in searching a title prior to settlement, and does not also search the journal, was guilty of negligence and liable in damages to the client for any loss that ensues. The problems of searching a journal were considerable, and it became clear that it was virtually impossible to ensure that the priority of a purchaser or mortgagee of land transfer land was fully protected. After exploring various possibilities for reform, a system of guaranteed searches was enacted by the legislature as at least a partial solution to the problem: Hinde, McMorland & Sim, *Land Law in New Zealand*, para 9.101(b).

[147] If a purchaser or mortgagee obtains a guaranteed search within a period of 14 days ending on the date of settlement, and proceeds to register the transfer of mortgage within a period of two months commencing with the day after the settlement, that person will have protection. Such a purchaser or mortgagee will be entitled under s 172A(3) to compensation for any loss or damage suffered as a

consequence of the registration or lodging of any instrument or other document with certain provisos.

[148] There is no doubt that the R S Trust through its solicitors obtained a guaranteed search which did not disclose any interest of the Emslies on the title. The R S Trust is entitled to protection under s 172A. This point has not been contested by the first third party, the Registrar-General of Land. No order for damages is sought at this hearing, but a declaration of liability is sought by the RS Trust and not contested by the Registrar General. I am satisfied that the RS Trust is entitled to such a declaration.

[149] No relief is sought in these proceedings by the Emlies against the Registrar General.

Fraud exception during the feasibility of registered title

[150] The statement of claim pleads that Mr Maxwell and Mrs Emslie, and then Genuine, fell within the fraud exception in s 182 of the Land Transfer Act 1952. This is not a matter that was pursued in submissions, and cannot affect the priority situation between the Emslies and the R S Trust.

Fair Trading Act claim against Genuine

[151] It is alleged in the statement of claim that Genuine engaged in misleading and deceptive conduct in terms of s 9 of the Fair Trading Act 1986. On the basis of that Act a declaration is sought that Genuine holds Borich Road in a remedial constructive trust for the benefit of the Emslies as beneficiaries, and an order is sought under s 43(2)(c) of the Fair Trading Act 1986 that the plaintiffs be restored to the certificate of title to Borich Road as registered proprietors.

[152] The Fair Trading Act cannot affect the priorities between the Emslies and the RS Trust. Section 43(2)(c) provides that the Court may make an order under the Act:

> … directing the person engaged in the conduct, referred to in sub-section (1) of this section to refund money or return property to the person who suffered the loss or damage.

[153] This does not give a Court the right to ignore the rights of third parties, or title to land. Any right that might arise pursuant to the Fair Trading Act depends on a Court order for its existence and in temporal terms arises after any existing interest in the land. Given the interest of the R S Trust, I am not prepared to make any order pursuant to s 43(2)(c).

[154] Ultimately there was little argument directed to the Fair Trading Act claim. It does not seem to me to be well suited to the complaints that the Emslies have against Genuine. The complaints are not so much of misleading and deceptive conduct against Mrs McCleary; it is rather that she persuaded them to entrust their property with her, and then abused that trust.

[155] The statements that were made by Mrs McCleary to the Emslies were statements about what would happen in the future. It has not been shown that those statements were known by her to be false at the time she made them or were reckless which is what is required if statements of future intention or belief can become misrepresentations: *New Zealand Motor Bodies v Emslie* [1985] 2 NZLR 569. On that test, there may not have been misleading and deceptive conduct. The fault of Mr McCleary and Genuine lies more in abusing the trust that was placed in her by the Emslies.

Summary

[156] I declare as follows:

a) Genuine held Borich Road as constructive trustee for the plaintiffs.

b) The R S Trust had an equitable interest in the land, as purchaser.

c) The R S Trust interest, while subsequent in time, has priority over the Emslies' interest.

d) The order that caveat X6093646.1 not lapse is revoked.

e) The judgment of 28 January 2005 does not create an issue estoppel.

f) The fourth defendant is entitled to compensation under s 172A of the Land Transfer Act from the Registrar-General of Land for loss or damage sustained as a result of the Emslies' second caveat being caveat X6093646.1.

g) The Emslies have claims against Genuine for breach of trust. If they wish to pursue these, they will need to prove their losses at a further hearing.

Costs

[157] The fourth defendant is entitled to recover its losses from the first third party. The Emslies are unworldly people who have been badly duped by Genuine and Mrs McCleary. In my discretion I am not inclined to make an order for costs against the Emslies, despite the fact that they have not succeeded in this proceeding. However if the parties wish to press the issue of costs they should file memoranda.

…….

Asher J